

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
August 10, 2004 Session

STATE OF TENNESSEE v. TALLIS S. BONDS

**Direct Appeal from the Circuit Court for Williamson County
No. I-6235 Russ Heldman, Judge**

No. M2003-02812-CCA-R3-CD - Filed October 26, 2004

The appellant, Tallis S. Bonds, pled guilty in the Williamson County Circuit Court to driving on a suspended license, second offense. Following a hearing, the trial court imposed a five hundred dollar (\$500) fine and sentenced the appellant to ten months confinement in the county jail to be served at seventy-five percent (75%). On appeal, the appellant argues that the trial court erred by denying probation and by failing to consider as mitigating that the appellant's conduct neither caused nor threatened serious bodily injury. Upon review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and ROBERT W. WEDEMEYER, J., joined.

Charles E. Walker, Nashville, Tennessee, for the appellant, Tallis S. Bonds.

Paul G. Summers, Attorney General and Reporter; Richard H. Dunavant, Assistant Attorney General; Derek Keith Smith, District Attorney General Pro Tem; and Mary Katharine White, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The following facts were gleaned from the transcripts of the suppression and sentencing hearings.¹ At approximately 4:43 p.m. on January 1, 2003, an officer with the Franklin Police Department stopped the appellant's vehicle upon hearing excessive noise coming from the vehicle's stereo system. A computer check revealed that the appellant's license had been suspended and "he had several warrants out of Metro." The appellant was subsequently indicted for driving on a

¹ A transcript of the guilty plea hearing was not included in the record on appeal.

suspended license, second offense. He filed a pretrial motion to suppress evidence obtained as a result of the computer search conducted after the stop of his vehicle. Following a hearing, the trial court denied the motion. Thereafter, the appellant pled guilty as charged, with the sentence to be determined by the trial court.

At the sentencing hearing, the State relied upon the evidence presented at the suppression hearing, a copy of the appellant's driving history, and a copy of the appellant's inmate record from the Tennessee Department of Correction, which record contained judgments of the appellant's prior convictions. Testifying on his own behalf, the appellant claimed that at the time of the instant offense he was driving to visit his grandparents and to take a friend's daughter home. The appellant related that since being stopped, he had applied for and obtained a valid driver's license. He explained that prior to obtaining his license, he was required to pay tickets in the amount of four thousand five hundred dollars (\$4,500). The appellant borrowed the money to pay for the tickets from friends and was repaying the loan. The appellant acknowledged that he had previously been convicted of driving on a suspended license in Davidson County. The appellant testified that he had two children from previous relationships, and he was currently employed part-time cleaning a friend's barber shop after hours.

On cross-examination, the appellant acknowledged that although he attempted to provide for the needs of his children, he had been unable to make regular child support payments. He claimed that because of his criminal history, finding full-time employment was difficult. The appellant conceded that he had three prior felony convictions and eight prior misdemeanor convictions. He further conceded that he had been sentenced to community corrections on three occasions and had violated the conditions of each of those sentences. He had also previously been sentenced to incarceration in the penitentiary, committing the instant offense within six months of his release. The appellant related that in the week prior to sentencing, he had used marijuana and cocaine. He stated that as a condition of probation he was willing to attend drug treatment; however, he denied being addicted to drugs.

After considering the sentencing principles and the evidence presented at sentencing, the trial court imposed a five hundred dollar (\$500) fine and sentenced the appellant to ten months confinement in the county jail to be served at seventy-five percent (75%). The appellant now appeals, arguing that the trial erred by denying probation and by failing to consider as mitigating that the appellant's conduct neither caused nor threatened serious bodily injury.

II. Analysis

When an appellant challenges the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (2003). Generally, the presumption of correctness is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). However, the trial court has more flexibility in misdemeanor sentencing than in

felony sentencing. State v. Johnson, 15 S.W.3d 515, 518 (Tenn. Crim. App. 1999) (citing State v. Troutman, 979 S.W.2d 271, 273 (Tenn. 1998)). In misdemeanor sentencing, the “trial court need only consider the principles of sentencing and enhancement and mitigating factors in order to comply with the legislative mandates of the misdemeanor sentencing statute.” Troutman, 979 S.W.2d at 274.

In conducting our review, this court must consider (1) the evidence, if any, received at trial and at the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to the sentencing alternatives; (4) the nature and characteristics of the offenses; (5) any mitigating or enhancement factors; (6) any statements made by the appellant on his own behalf; and (7) the appellant’s potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210 (2003); see also Ashby, 823 S.W.2d at 168. The burden is on the appellant to show that the sentence is improper. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

In the instant case, the appellant pled guilty to driving on a suspended license, second offense, a Class A misdemeanor. Tenn. Code Ann. § 55-50-504(a)(2) (Supp. 2002). The authorized sentence for a Class A misdemeanor is a period not greater than eleven months and twenty-nine days. Tenn. Code Ann. § 40-35-111(e) (2003). Unlike a defendant convicted of a felony, a defendant convicted of a misdemeanor is not entitled to a presumptive minimum sentence. Johnson, 15 S.W.3d at 518 (citing State v. Baker, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997)). Rather, in sentencing the misdemeanor defendant, the trial court shall fix a percentage of the sentence, not to exceed seventy-five percent, that the defendant must serve in confinement before being eligible for release into rehabilitative programs. Tenn. Code Ann. § 40-35-302(d). In determining the percentage of the sentence to be served in confinement, the trial court shall consider the sentencing principles and enhancement and mitigating factors and “shall not impose such percentages arbitrarily.” Id.; see also Troutman, 979 S.W.2d at 274.

On appeal, the appellant first contends that the trial court erred by denying probation. Specifically, the appellant asserts that his request for probation was not considered until after the trial court determined that a period of confinement was necessary. The appellant argues that “a defendant eligible for probation must be considered for probation.” The State maintains that the trial court committed no error in denying probation.

A trial court has the authority to place a misdemeanor defendant on probation either after service of a portion of the sentence in confinement or immediately after sentencing. Tenn. Code Ann. § 40-35-302(e) (2003). However, unlike certain offenders convicted of Class C, D, or E felonies who are entitled to a presumption in favor of probation, the appellant is entitled to no such presumption regarding his misdemeanor sentence. State v. Williams, 914 S.W.2d 940, 949 (Tenn. Crim. App. 1995). Moreover, an appellant seeking full probation bears the burden of establishing his suitability for full probation, regardless of whether he is entitled to the statutory presumption favoring alternative sentencing. State v. Boggs, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996). To establish suitability, the appellant must demonstrate that granting full probation will “subserve the

ends of justice and the best interests of both the public and [the appellant].” State v. Dykes, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990), overruled on other grounds by State v. Hooper, 29 S.W.3d 1 (Tenn. 2000). Additionally,

[i]n determining one’s suitability for full probation, the court may consider the circumstances of the offense, the [appellant’s] potential or lack of potential for rehabilitation, whether full probation will unduly depreciate the seriousness of the offense, and whether a sentence other than full probation would provide an effective deterrent to others likely to commit similar crimes.

Boggs, 932 S.W.2d at 477.

In the instant case, the trial court denied the appellant’s request for probation upon finding that the appellant had a “very, very low prospect for rehabilitation.” The trial court stated, “What’s really troubling is the fact that after pleading guilty [in the instant case], and knowing that you were going to have a sentencing hearing, you go right . . . back into the life that you have pursued from an early age, the life of drugs.”

We conclude that the record supports the trial court’s finding that the appellant had little, if any, potential for rehabilitation. The appellant has an extensive criminal history of felony and misdemeanor convictions, including convictions of robbery, assault, and drug offenses in addition to various traffic violations. The appellant also violated the terms of alternative sentencing on three prior occasions. Moreover, at the sentencing hearing, the appellant admitted to using cocaine and marijuana in the week prior to sentencing, but denied being addicted to the drugs. Accordingly, we conclude that the trial court committed no error in denying the appellant’s request for probation.

Next, the appellant contends that the trial court failed to consider as mitigating that the appellant’s conduct neither caused nor threatened serious bodily injury. Tenn. Code Ann. § 40-35-113(1) (2003). The record does not reflect whether the trial court considered this factor. However, in misdemeanor sentencing, “[t]he lack of findings is no basis for holding the trial court in error.” State v. Russell, 10 S.W.3d 270, 278 (Tenn. Crim. App. 1999). The presumption of correctness applies despite the trial court’s failure to make specific findings on the record. Troutman, 979 S.W.2d at 274. This court reviews misdemeanor sentencing to ensure that the trial court considered the enhancement and mitigating factors and did not act arbitrarily.

In the instant case, the trial court considered the sentencing principles and the appellant’s lengthy criminal history in sentencing the appellant. See Tenn. Code Ann. § 40-35-114(2) (2003). Even if the trial court considered that the appellant’s conduct neither caused nor threatened serious bodily injury, the appellant’s criminal history supports the sentence of ten months confinement. Accordingly, we conclude that the trial court did not act arbitrarily in sentencing the appellant.

III. Conclusion

Finding no reversible error, we affirm the judgment of the trial court.

NORMA McGEE OGLE, JUDGE